2017 IL App (1st) 160781-U

No. 1-16-0781

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FIFTH DIVISION
June 23, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE ESTATE OF EARL MIGDAL, Deceased,	)	Appeal from the Circuit Court of Cook County.
RONALD MIGDAL, as Trust Beneficiary, Petitioner-Appellant,	)	
v.	)	No. 2010 P 3200
RAYNA JOSEPH, as Trustee of the Earl Migdal Revocable Living Trust Dated October 28, 1998, as Restated on April 15, 2004, and as Amended on April 27, 2010, Respondent-Appellee.	)	The Honorable Mary Ellen Coghlan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not abuse its discretion in denying the beneficiary's request to remove his sister as trustee where there was no evidence that the trustee's actions endangered or threatened the existence of the trust.

¶2 Petitioner, Ronald Migdal, appeals the circuit court's order denying his petition to issue citation for the removal of his sister, respondent, Rayna Joseph, as trustee of their deceased father's trust. Ronald contends the circuit court abused its discretion in denying his petition to remove Rayna as trustee where she and her husband used the trust property for their own benefit and to the detriment of the trust. Based on the following, we affirm.

¶3 FACTS

¶4 Earl Migdal died on April 30, 2010. His wife predeceased him. He had three surviving children, Ronald, Allen, and Rayna. On October 28, 1998, Earl created the Earl Migdal Revocable Living Trust (the Trust). The Trust was restated on April 15, 2004, and amended and restated on April 27, 2010. Earl was the trustee of the Trust with Rayna named as the successor trustee and Mitch Joseph, Rayna's husband, as the next successor. Rayna and Ronald were named as the beneficiaries of the Trust with 75% of the Trust to be distributed to Rayna and 25% of the Trust distributed to Ronald, with Rayna as trustee of the Ronald Migdal Trust. Rayna assumed her duties as trustee after Earl's death.

¶5 The Trust, as amended and restated on April 27, 2010, provided the trustee with, in relevant part, the following powers: (1) "to invest and reinvest the trust property in bonds, stocks, mortgages, notes, options, limited partnership interests or other property of any kind, real or personal, domestic or foreign suitable for the investment of trust funds;" (2) "to retain any property originally constituting the trust or subsequently added thereto, although not of a type, quality or diversification considered proper for trust investments;" (3) "to cause any property, real or personal, belonging to the trust to be held or registered in the trustee's name or in the name of a nominee or in such form as the trustee deems best without disclosing the trust relationship;" (4) "to borrow money from any lender, including the trustees hereunder

individually or a parent or affiliate company, extend or renew any existing indebtedness and mortgage or pledge any property in the trust; and also to open accounts, margin or otherwise, with brokerage firms, banks or others, and to invest the trust property in, and to conduct maintain and operate these accounts for the purchase, sale and exchange of stocks, bonds and other securities, and in connection therewith to borrow money, obtain guarantees, and engage in all other activities necessary or incidental to conducting, maintaining and operating these accounts;" (5) "to employ agents and proxies of all types, including but not limited to accountants, attorneys, banks and other financial institutions, and investment advisors, and to delegate to them such powers as the trustee considers desirable;" and (6) "to invest any money at any time in a trust in such property, real or personal, as the trustee shall deem wise, without being limited by any statute or rule of law regarding investment by trustees." The Trust additionally provided that "[n]o successor trustee shall be personally liable for any act or omission of any predecessor trustee. Any successor trustee shall have all the title, powers and direction of the trustee succeeded, without the necessity of any conveyance or transfer."

¶ 6 Rayna is a doctor. She and Mitch have three children. For the five years prior to Earl's death, Rayna saw her father twice a week. Ronald, however, was estranged from Earl when he died—the pair spoke approximately three times in the five years preceding Earl's death. Ronald had lived in California for 22 years at the time. After becoming trustee of the Trust, Rayna shared trust documents with Ronald, including financial statements, and communicated about the Trust with him in person, via email, and by telephone.

¶ 7 In considering Ronald's petition to remove Rayna as trustee of the Trust, the circuit court heard eight days of testimony. The evidence demonstrated that, during his lifetime, Earl was known as a savvy businessman. Earl conducted his business based on personal relationships,

relying on verbal agreements and handshakes. At the time of his death, Earl's main business was Tower Financial, LLC. Tower Financial made loans to individuals and obtained mortgages as security for those loans. Earl was the sole owner and employee of Tower Financial. Tower Financial was held in the Trust. Tower Financial owned and was operated out of a warehouse located at 917 W. 18th Street in Chicago, Illinois.

¶8 In 2006, Earl and Mitch began developing townhouses together. A development located at 1925 W. Potomac included a 5-unit project. Earl obtained two credit lines from Chicago Community Bank, one for $1.5 million and one for $500,000, with a 5% interest rate in the name of 1925 Potomac, LLC, to finance the project. Earl pledged the 917 W. 18th Street property as collateral for the lines of credit. Earl hired Mitch's company, RMJ Properties, LLC, as the project manager. The pair signed a consulting agreement and Mitch worked with the construction company, architect, and banks to complete the project. RMJ Properties was paid $100,000 for Mitch's services plus additional compensation for each unit sold. Earl granted Mitch power of attorney in February 2007, which provided Mitch with broad powers to transact business on Earl's behalf, including the power to obtain credit and to sign documents such as notes, credit agreements, security agreements, and financing statements. Mitch generally contacted the bank to draw from the line of credit to finance the project. The Potomac project was completed in 2008: four of the units were sold and the final unit was rented. The rental payments received from the fifth unit were applied to pay down the line of credit.

¶9 A second development project began in the spring of 2008. The new development involved the construction of four townhouses located at 1900 Loomis Street in Chicago, Illinois. Tower Financial originally owned the 1900 Loomis Street property. Earl directed Michael Fiandaca, his attorney, to create 1900 Loomis, LLC, naming Mitch as its sole owner. Pursuant to

Earl's instruction, Fiandaca transferred the 1900 Loomis Street property by deed from Tower Financial to 1900 Loomis, LLC, for $165,000. An accompanying mortgage and note were prepared to reflect the property sale. Earl additionally directed Fiandaca to obtain a tax identification number for 1900 Loomis, LLC, to prepare a real estate transfer declaration form for 1900 Loomis, LLC, and to obtain a water certification transfer form for 1900 Loomis, LLC. In March 2008, Earl renewed and extended the $1.5 million 1925 Potomac, LLC, line of credit. In April 2008, Earl signed an authorization to disburse loan proceeds, which provided him with access to $1.3 million. Then, in May 2008, Earl and Mitch appeared together to create a new bank account for 1900 Loomis, LLC, with both signing the signature cards. The Loomis project was financed by the 1925 Potomac, LLC, line of credit.

¶10 RMJ Properties acted as the project manager and the same architect and contractors were used on the Loomis project as those for the Potomac project. RMJ Properties and 1900 Loomis, LLC, entered a consulting agreement for Mitch's services. Mitch signed the agreement on behalf of both companies. Between $800,000 and $1 million was drawn from the line of credit to finance the 1900 Loomis project while Earl was alive. Mitch contacted the bank to make those draws.

¶11 When Earl died in April 2010, the Loomis project was 85% complete. In order to complete the project, Mitch contacted the bank three or four additional times to draw from the line of credit. Rayna authorized the final three or four bank draws in her capacity as trustee. The Loomis project was completed at the end of 2010. The total cost of the project was approximately $1.2 million. The townhouses were not sold, but were rented for between $1,800 and $2,000 per month per unit. The rental of the Loomis townhouses generated $80,000 in income, which was used to pay down the Potomac line of credit. In addition, 1900 Loomis, LLC,

paid off the $165,000 loan to Tower Financial. From 2008 to 2013, Rayna and Mitch reported 1900 Loomis, LLC, on their joint tax returns. Then, in December 2014, Mitch assigned his interest in 1900 Loomis, LLC, to Tower Financial. According to Rayna and Mitch, Mitch acted as a nominee for the property pursuant to Earl's direction; however, the 1900 Loomis project always remained an asset of the Trust.

¶12 At the time of trial, the total outstanding on the Potomac lines of credit was $300,000.

¶13 The trial evidence additionally demonstrated that Rayna made three investment loans from Tower Financial to RMJ Properties, LLC, and Joseph Enterprises, LLC, one for $75,000.00, a second for $25,000.00, and a third for $100,000.00. The interest Tower Financial received on those loans was 10%, 10%, and 7%, accordingly. The first two loans were used by RMJ Properties to invest in Razor II and Razor III, and the third loan was used to invest in "9609." The interest payments and loans were paid according to their schedules.

¶14 Moreover, Rayna, as trustee, sold the W. 18th Street property. The proceeds of the sale were used to pay down the line of credit.

¶15 On November 13, 2013, Ronald filed a petition to terminate the independent administration of the Trust. On February 19, 2014, the petition was granted and the Trust became subject to supervised administration. The circuit court ordered Rayna to file an inventory and accounting of the Trust. Rayna responded by filing an accounting for the Trust for the time period of May 2010 to April 30, 2014. The accounting revealed the following Trust assets: (1) a Bank of America checking account valued at $272,788.37; (2) 36 mortgage notes valued at $2,990,780.00, including one for 1900 S. Loomis for $165,000.00, which was noted as having been paid off; and (3) three parcels of real property valued at $1,520,000.00—the 917 W. 18th Street property, which was valued at $1,000,000.00, the 1927 W. Potomac property valued at

$500,000.00, and the final parcel in Hayward, Wisconsin, valued at $20,000.00. The accounting indicated $1,539,558.80 in income/receipts and $1,450,487.95 in payments/disbursements. The accounting was signed by Fiandaca.

¶16 Fiandaca, however, submitted an amended accounting on June 5, 2014, covering the same time period of May 2010, until April 30, 2014. The amended accounting provided the following Trust assets: (1) a Bank of America account valued at $272,788.37; (2) 38 mortgage notes providing more thorough descriptions of each*, i.e.*, dates, interests rates, etc, including the mortgage given on 1900 S. Loomis to secure a note in the amount of $165,000.00, which was noted as having been paid off, and an unsecured loan to 1900 Loomis, LLC, in the amount of $1,000,000.00 for the development of the four townhomes; (3) real property in Hayward, Wisconsin valued at $20,000 and the remaining 1927 W. Potomac property valued at $500,000; (4) a beneficial interest in the 917 W. 18th Street property, valued at $1,000,000, but that was encumbered by a mortgage in the amount of $1,250,000.00 used as security for the loan for the 1925 W. Potomac development and for the benefit of 1900 W. Loomis; and (5) 1925 W. Potomac, LLC, which was formed on November 18, 2005, to develop five condominiums at that address, valued at $15,000. The accounting indicated $1,539,558.80 in income/receipts and $1,450,487.95 in payments/disbursements. The accounting also listed, as personal property, a number of "investments," including Razor II and Razor III valued at $75,000, "Investment 9609" valued at $50,000, and VCP Funding II valued at $100,000. The accounting was signed by Rayna.

¶17 Ronald filed a number of objections to the accountings, to which Rayna responded. Then, on November 13, 2014, Ronald ultimately filed a petition to remove Rayna as trustee. In the petition, Ronald alleged that Rayna mismanaged and wasted the Trust assets by misappropriating

the bulk of the assets to Mitch, failing to properly account for banking transactions and loans, and paying excessive legal fees. Rayna, *vis a vis* newly hired counsel, responded by filing a motion to strike and answer the petition. In her pleading, Rayna denied the material allegations of Ronald's petition.

¶18 On October 28, 2014, the circuit court entered an order providing that Rayna was restricted from making expenditures of any kind on behalf of the Trust absent court order.

¶19 Then, on April 27, 2015, Ronald filed an amended petition to issue citation to remove Rayna as executor of Earl's estate[1] and as trustee, alleging the following bases for removal: (1) improper real estate management fees wherein Rayna hired Mitch's company, RMJ Properties, to manage six of the properties held in the Trust at a cost of $4,000.00 per month; (2) the 1900 Loomis Street project wherein, using his power of attorney, Mitch transferred over $1.5 million from a line of credit opened for the purpose of developing the Potomac project and placed the money into 1900 Loomis, LLC, which was owned by Mitch, and later assigned his ownership rights in 1900 Loomis, LLC, to Tower Financial, recouping $866,000.00 in the process; (3) investments in Razor II and III and "9609" that were not properly accounted for and were mismanaged as loans to Mitch for his own personal investment opportunity; (4) trust administration anticipatory abuse of discretion; (5) incomplete accounting; and (6) the sale of 18th Street property for less than its value. In his prayer for relief, Ronald requested the removal of Rayna from the Trust and appointment of him as trustee. Prior to trial, Ronald dismissed count 4 as a basis for removal.

¶20 Following plaintiff's case-in-chief, Rayna made a motion for a directed finding for each of the counts. The circuit court entered a directed finding on the first basis for removal, namely,

[1] Earl's estate is not at issue in the instant appeal.

the management fees Rayna authorized to RMJ Properties. The motion for directed verdict was denied as to the remaining four counts.

¶21 On March 3, 2016, following a lengthy trial, the court denied Ronald's amended petition to remove Rayna as trustee of the Trust. In light of the standard of review for this appeal, we quote the circuit court's ruling at length. The court stated:

> "Over the past few weeks, the Court has had an opportunity to hear and consider over, actually, I think it's eight days of testimony in this trial the arguments of counsel. The Court has carefully observed the witnesses while they've testified, carefully considered their demeanor, their credibility, their forthrightness or lack thereof in answering questions. And I don't think it would be in anyone's benefit to delay any further a ruling in this matter.
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> * * *
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> Over the past few weeks, I've heard a lot of testimony about what occurred prior to Earl's death. And at the end of the day, I think that it's abundantly clear without question that Earl and his daughter Rayna and his son-in-law Mitch Joseph have an incredibly close and happy and fulfilling, at least on Earl's end, and probably on their end as well, relationship.
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> ***
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> In this case, I don't know why, there has been some evidence about why with respect to certain of the brothers of Rayna, but I don't know for sure why, but I do know it to be a fact that the decedent, Earl Migdal, was very close with his daughter, had a very close relationship with his daughter and son-in-law and had a very strained relationship, certainly, with Allan and also with Ronald.

The Court is mindful of the fact that the only beneficiaries of this trust are Rayna and Ronald. Allan has been totally excluded. Obviously, being the only daughter in a family and being as successful as Dr. Joseph clearly is, there might be some jealously and animosity. I don't think that it would surprise anyone to think that, perhaps, it seems as if that your father probably favored you. And maybe there was a reason for that. I don't know. But, certainly, there [are] a lot of bad feelings in this family that have existed for a lot of years.

* * *

Dr. Joseph is a doctor. She is not an accountant. She is not a lawyer. She is not a banker. However, she was the person designated by her father who he wanted to serve as his trustee. She is also the primary beneficiary, I think 75 percent or somewhere along that line of this trust. So to me, the argument that she would do anything to diminish the value of the trust is ridiculous, absurd, and not borne out by anything that I've seen in the last two weeks. That doesn't mean that things could have been done a whole lot better by this doctor, nonattorney, nonaccountant trustee. And if nothing else during the course of this trial, the Court is even more convinced now than the Court was before that with respect to lawyers, as well as probably everything else, you get what you pay for. So I've heard some evidence about the gist of it being, well, now we have good lawyers that understand issues in these types of cases. ***. And hopefully, since we now have good lawyers on both sides, the litigation going forward on an ongoing basis will be minimal.

***.

So I'm going to briefly touch on what I think are the highlights of what I heard anyway for the past two weeks.

One is Potomac, the initial project where Earl and Mitch worked together, enjoyed working together, were successful working together, had a great experience, built a great building, number of condos, good for the neighborhood, was good for Earl, was good for Mitch, and was good for everyone. Everyone loved it. It was so successful that thereafter, the evidence shows, and I believe it's credible that Earl and Mitch decided to do it again[,] engage in another project, 1900 South Loomis. The recordkeeping and the way that this was arranged is a little unorthodox, a little unusual, probably not the best way to do things, but it was what Earl wanted and what he did, and how he directed it be done, and that's why it was done the way it was. The evidence on that point is completely credible.

I believe based on the testimony, that 1900 South Loomis was always intended to be an asset of this estate, of Tower, the trust. I do not for one moment believe that Earl intended Mitch would be in charge of the whole project, own the whole project, and he would have nothing to do with it. That is not borne out by the evidence. Earl, if nothing else, the evidence strongly shows was a savvy, interested, active participant in his real estate holdings and transactions.

It seems to me based on everything I've seen and heard over the course of this trial that he thrived on these types of negotiations and deals and he was seems to me never happier than when engaged with his son-in-law on but yet another pretty complex real estate transaction. And both of these by my standards anyway seem to be very high-level real estate transactions.

I've heard a lot of testimony suggesting that it was not a successful project. That is totally not borne out by the evidence. The fact is that it wasn't sold under the

circumstances of the real estate market over the past couple of years does not mean its not a successful investment and/or property. It's fully rented out. You know, that's a very interesting location in the City of Chicago. It's a location in the City of Chicago that is appreciating almost on a daily basis. And to suggest that that is not a good investment for this trust is not borne out by the evidence at best and just an absurd conclusion to reach at worst.

The testimony shows that this is an asset of the trust. They own it free and clear. Theoretically, they could turn around and sell it tomorrow, or they could continue to hold on to it making the 80,000-some-odd dollars a year in interest that is going to pay off the balance of the line of credit, which the testimony shows, although it at some point in time was $2 million between the two lines of credit, it's now down to $300,000 left on one. From where I'm sitting, that looks pretty darn good.

Twist is a red herring. Twist became insolvent before Earl died. Twist was in foreclosure before Earl died. Mitch notified Earl in writing that Twist was insolvent and as of the date of his death in April of 2010, Earl for whatever reason did nothing about it. He took no action. He, apparently, was satisfied. I think in this kind of occupation or profession, you win big, you lose big. For whatever reason, we'll never know. All we do need to know is this all occurred prior to Rayna coming on board as trustee, and for whatever reason, it is what Earl wanted. Earl did not want to do anything. So I don't think it's fair to expect Rayna to do what Earl elected to not to.

Razor and 9609, to suggest that these investments, loan investments, are bad investments is not borne out by the evidence. They're being repaid at a significant

amount of interest you can't get in any bank or conventional investment that I'm aware of in today's market. So I don't see the problem with that at all.

917 West 18th Street, we heard a lot of testimony about it, was sold for [$]1.7 million. There was a bank appraisal, so this argument that there is no appraisal is flat out wrong. There was evidence that by doing it the way they did it, they saved not only a 3 percent brokerage fee, but also kept open the possibilities of, perhaps, being able to engage in some other kind of deal that could have—I didn't hear any evidence that it did—but, theoretically, could have been a benefit to the estate. I don't fault them for that.

Under all the testimony and all the facts that I heard, I'm not at all troubled by the sale of 917 West 18th Street for $1.7 million under all the facts and circumstances and under, again, the current state of our real estate market, what we've all experienced in the last five years or so.

The testimony was something along the lines of that the price was determined by the comps in the area, other sales in the area, similar buildings that have been sold, negotiations with other developers, meetings with other developers and their valuations of the building. The fact that the building had building code violations and environmental issues, all of this is reasonable. This is the way people conduct business when they're in real estate when they're in the real estate business. I'm not at all troubled by that, nor am I surprised by the fact that Ronald who is not in that business would have some serious concerns. I don't fault Ronald at all. I just think that having now had the benefit of two weeks of trial, that his concerns, and it's a good thing, were really not justified.

And, again, I'm hitting on certain portions of the evidence, which is not at all to infer that I did not carefully consider all of the evidence.

The argument that there is nothing to connect Earl to 1900 Loomis is just simply not factually accurate. Again, it's overwhelmingly clear from the testimony I heard in this courtroom, from the parties that were actually with Earl a couple times a week for the last five years or so that he was running this train. He was in complete control. He thrived on it. He enjoyed it. And he knew exactly what was going on. There is nothing to suggest otherwise.

Again, I think I asked one of the attorneys why would anyone want something to be in someone else's name when someone else was supposed to own it, and the answer is quite frank. Who knows? We'll never know. It was what Earl wanted. ***.

For purposes of this issue before the Court whether or not Rayna has engaged in any conduct that would justify this Court's removal of her as trustee, there are a couple of legal principal cases I want to cite. One is Wylie v. Bushnell ***.

In that case, the Illinois Supreme Court stated the power or removal of trustees appointed by deed or will are to be exercised sparingly by the courts. Now, obviously, this is not a deed or a will. It's a trust. There must be a clear necessity for interference to save the trust property. Mere error or even breach of trust may not be sufficient. There must be such misconduct as to show want of capacity or fidelity putting the trust in jeopardy.

In this case, there is absolutely no evidence of that. Why would there be? She is the beneficiary of 70 percent or more of the assets of this trust. It's certainly in her benefit to do nothing that's going to jeopardize the trust, and I don't think that she has.

Were recordings prepared inaccurately, yes. Were accountings not done up to the standard as the Court requires based on our local rules, yes. Will it be done better in the future, I hope so. Is that a basis to remove her, no.

Reniker v. Reniker ***. Trustee must use care and diligence in the discharge of his powers and duties, is held to a high standard of conduct, and must exercise the utmost or highest good faith in the administration of the trust. The trustee must keep in mind the beneficiary's interest, and trustee cannot do any act inconsistent with the beneficiary's interest irrespective of the trustee's good or bad faith. Further, good faith in the administration of a trust means trustee must act honestly and with undivided loyalty to the trust not merely to the standard of the work—but with the most sensitive degree of honor.

And, finally, Lobner v. JP Morgan Chase [*sic*] ***. A court of equity has inherent power to remove a trustee for breach of trust, misconduct, disregard of fiduciary duties, ***; however, removal of a trustee is an extreme remedy. Neither the Court nor any party should lightly disregard the testator's choice of trustee, which as we all know in this case is Rayna. And if Rayna is discharged, then it's Mitch. That was Earl's idea.

Not every instance of mistake or neglect on the trustee's part requires removal of a trustee. The Court should remove a trustee only if the trustee endangers the trust, the trust fund, and removal is clearly necessary to save the trust.

Personal hostility between a trustee and a beneficiary is not a per se ground for removal of the trustee. To remove the trustee, the hostility must be shown to interfere with the beneficial administration of the trust.

In this case, there is clearly hostility; although, clearly, the evidence shows that was not always the case. Maybe I am naïve, and maybe I'm overly optimistic, but I hope in the future, somewhere down the line that Ronald and Rayna are able and Mitch, for that matter, are able to put aside their differences and come together for the sake of their family. I think their dad would have liked that. I think that Earl would be aghast and extremely upset of the way this has all played out.

Finally, if you look at the trust itself, everything that I've heard that Rayna has done since she has come on board, she is authorized by the trust to do. I've read the whole trust in its entirety. But just for purposes of this argument, I would like to highlight the first restatement dated April 15, 2004, I think that's the –I'm sorry, I take that back.

April 27, 2010, Article 7. A, Rayna is authorized to invest and reinvest the trust property in bonds, stocks, mortgages, notes, options, limited partnership interest or other property of any kind real or personal, domestic or foreign, suitable for the investment of trust funds.

C, to cause any property real or personal belonging to the trust to be held or registered in the trustee's name or in the name of a nominee or in such other form as a trustee deems best as without disclosing the trust relationship.

To retain any property originally constituting, B, the trust or subsequently added there to although not of a type, quality, or diversification considered proper for trust investments.

I, to compromise, contest, prosecute or abandon claims in favor of or against the trust.

> J, to invest any money at any time in a trust in such property, real or personal, as a trustee shall deem wise without being limited by any statute or rule of law regarding investment by trustees.
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> Finally, page 8, Section 5A, no successor trustee shall be personally liable for any act or omission of any predecessor trustee.
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> Based on the evidence introduced during this trial it would be an abuse of this Court's discretion to remove Rayna Migdal as the trustee of the Earl Migdal revocable living trust. This Court declines to do so."

The circuit court memorialized the findings made in open court on the same date. In addition, the March 3, 2016, order vacated its October 28, 2014, order restricting Rayna from making disbursements from the Trust. This appeal followed.

¶22 ANALYSIS

¶23 Ronald contends the circuit court erred in denying his amended petition to issue citation to remove Rayna as trustee of the Trust. Ronald maintains that the circuit court abused its discretion in finding Rayna's improper administration of the Trust did not serve as a basis for her removal.

¶24 In general, a trustee owes a fiduciary duty to beneficiaries of a trust and is obligated to carry out the terms of the trust, acting with the highest degree of fidelity and utmost good faith. *In re Estate of Muppavarapu*, 359 Ill. App. 3d 925, 929 (2005) (citing *Giagnorio v. Emmett C. Torkelson Trust*, 292 Ill. App. 3d 318, 325 (1997)). The trustee must be mindful of the interests of the beneficiaries and cannot act inconsistently with those interests, irrespective of the trustee's good or bad faith. *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 464 (2008) (citing *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 715 (1987)). A court, however, should not

interfere with the discretion afforded to the trustee by the trust instrument so long as the trustee does not act in a wholly unreasonable or arbitrary manner. *Id*. Moreover, " '[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' " *Id*. (quoting Restatement (Second) of Trusts § 187, at 402 (1959)).

¶25 The appointment and removal of a trustee is within the trial court's discretion. *In re Estate of Mercier*, 2011 IL App (4th) 110205, ¶ 14. We will not disturb the trial court's decision absent an abuse of that discretion. *Id*. Whether it is appropriate to remove a trustee depends on the facts and circumstances of each case. *Id*. This court has instructed:

> "A court of equity has inherent powers to remove a trustee for breach of trust, misconduct, or disregard of his fiduciary duties. [Citation.] However, removal of a trustee is an extreme remedy, and neither the court nor any party should lightly disregard the testator's choice of trustee. [Citation.] Not every instance of mistake or neglect on the trustee's part requires the removal of the trustee. [Citation.] The court should remove a trustee only if the trustee endangers the trust fund and removal is clearly necessary to save the trust. [Citation.] Personal hostility between a trustee and a beneficiary is not a *per se* ground for removal of the trustee. [Citation.] To remove the trustee, the hostility must be shown to interfere with the beneficial administration of the trust. [Citation.] Such hostility is just one factor to consider where the 'hostilities of the parties combine with other circumstances to render removal of the trustee essential to the interests of the beneficiary and the execution of the trust.' [Citation.]" *Laubner*, 386 Ill. App. 3d at 467.

¶26 Ronald's main argument is that Rayna should be removed as trustee because of her actions related to the Loomis project. Ronald does not allege that Rayna breached the Trust nor

that she breached her fiduciary duties as trustee but, rather, argues that she engaged in misconduct by allowing Mitch to transfer the Loomis project to the Trust after failing to sell the units. According to Ronald, the Loomis project was not an asset of the Trust and Mitch was not merely a "nominee" acting on behalf of Earl and the Trust; instead, Ronald argues that Rayna diminished the value of the Trust by accepting the Loomis property, which was owned outright by Mitch, as a Tower Financial asset when it became clear the project was unsuccessful.

¶27 Based on the record before us, we find the circuit court did not abuse its discretion in refusing to remove Rayna as trustee of the Trust. The case law is clear that substantial deference must be given to a testator's choice of trustee, which there is no dispute was Rayna in this case. See *Laubner*, 386 Ill. App. 3d at 467.

¶28 Moreover, we cannot say that Rayna's actions with regard to the Loomis project endangered the Trust, and her removal as trustee is necessary to save it. *Id.* In fact, the evidence demonstrated that the project was nearly complete prior to Earl's death and, therefore, prior to Rayna's appointment as trustee. Although the parties dispute the ownership of the Loomis properties, it is clear that Earl had an established relationship building townhouses with Mitch. The first project was completed in 2008, yet, as the Potomac project concluded, Earl renewed and extended the $1.5 million 1925 Potomac, LLC, line of credit, signed an authorization to disburse loan proceeds providing access to $1.3 million, and appeared with Mitch to create a new bank account for 1900 Loomis, LLC, with both having signatory rights. Mitch continued to maintain power of attorney for the line of credit and Earl transferred the Loomis deed from Tower Financial to 1900 Loomis, LLC, an entity he directed his attorney, Fiandaca, to create. All of the same providers that were used for the Potomac project, *i.e.*, contractors, architect, and bank, were used for the Loomis project, including RMJ Properties as project manager. The

pattern of both the Potomac project and the Loomis project, coupled with the fact that the vast majority of financing was completed—between $800,000 and $1 million on a $1.2 million project—prior to Earl's death and Rayna's installation as trustee, demonstrates that Earl directed the Loomis project as an asset of the Trust. For whatever reason, Earl created 1900 Loomis, LLC with Mitch as the sole member to hold the deed to the property, but he directed a significant sum of the money from the line of credit, which was a liability of the Trust, to construct the four townhouses thereon. Ronald conceded Earl knew about the project.

¶29 As the circuit court stated in its findings, it thoroughly considered all of the evidence presented over the course of the trial, as well as the credibility of the witnesses and the weight to be afforded their testimony. See *Anderson v. City of Chicago*, 29 Ill. App. 3d 971, 974-75 (1975) ("[i]t is long established that when testimony is contradictory, the determination of the credibility of witnesses and the weight to be afforded their testimony are matters for the trier of fact.") After eight days of testimony and countless pleadings, the circuit court found the Loomis project was always an asset of the Trust and, therefore, Rayna's acceptance of Mitch's transfer of 1900 Loomis, LLC, to the Trust was appropriate. We cannot find an abuse of the court's discretion.

¶30 Further, Ronald never expressly identified any losses assumed by the Trust in conjunction with the Loomis project; rather, Ronald insisted the project was unsuccessful merely because the townhouses were not sold. The townhouses, however, consistently were rented for a total of $80,000 per year, which was applied to the outstanding line of credit, again, the line of credit being a liability of the Trust. At the time of trial, $300,000 of the $1.5 million line of credit remained outstanding. Accordingly, the proceeds of the property that Ronald deemed was wholly owned by Mitch were passed through to the Trust. The Trust expressly contemplated a situation such as this wherein a Trust asset was held by a nominee. There were no restrictions or time

constraints placed on such a situation; therefore, Mitch's transfer of 1900 Loomis, LLC back to the Trust in 2014 does not alone demonstrate Rayna's misconduct as trustee. Rather, despite Ronald's position that Rayna's actions were hostile, any hostilities between the parties did not combine with other circumstances to render Rayna's removal essential to the interests of Ronald and the execution of the trust. See *Laubner*, 386 Ill. App. 3d at 467.

¶31 Simply stated, the Trust document provided the trustee with broad discretion to invest and reinvest the Trust property, to borrow money and open accounts on behalf of the Trust, to cause any Trust property to be held in the name of a nominee, and to retain any property originally constituting the Trust or subsequently added thereto. The actions of Earl prior to his death and those of Rayna subsequent to Earl's death were in compliance with the terms of the Trust. In sum, the evidence did not demonstrate Rayna acted in a wholly unreasonable or arbitrary manner; therefore, the circuit court's refusal to remove her as trustee was not an abuse of discretion. *Id*. at 464.

¶32 Ronald additionally contends the circuit court abused its discretion in finding the Razor investments and the "9609" investment were merely investment loans. Ronald maintains that the accounting did not support such a finding. Seemingly, in the alternative, Ronald argues that the loans demonstrated Rayna engaged in self-dealing wherein she loaned Mitch the money despite his historic involvement with bad loans.

¶33 Again, we find the circuit court did not abuse its discretion in refusing to remove Rayna from her position as trustee. While the amended accounting submitted by Rayna reflected the loans as "investments," the evidence demonstrated that Rayna agreed to loan the money to Mitch's company, RMJ Properties, which he then used in conjunction with other loans to invest in Razor II and III and "9609." The Trust property was clearly used as investment loans and not

direct investments in the entities themselves. There is absolutely nothing to support Ronald's theory that Rayna converted the investments into loans. Initially, we must recognize the supreme court's conclusion that a trustee's failure to make proper accountings of trust property is not a basis for the trustee's removal where there was not a "clear necessity for interference to save the trust property." *Wylie v. Bushnell*, 277 Ill. 484, 505 (1917); see also *Laubner*, 386 Ill. App. 3d at 467 ("[n]ot every instance of mistake or neglect on the trustee's part requires the removal of the trustee"). Further, Ronald's contention really speaks to his displeasure with Rayna's decision to loan the Trust property to RMJ Properties when the actual investments proved to be more profitable than the 7% and 10% interest the Trust received on the loans. The Trust, however, provided Rayna with the discretion to make that decision. Moreover, the Trust benefitted from engaging in the loans to the tune of 7% and 10% interest. There is no evidence that Rayna's decision threatened the Trust in any way.

¶34 To the extent Ronald claims Rayna improperly engaged in self-dealing, we again point out that the Trust earned a profit as a result of the loans. The fact that the investments proved more profitable, thereby making more money for Rayna's husband's company, was not a surety by any means. RMJ Properties' investment in the entities was, like any investment, a risk that could have proved unfavorable for RMJ Properties, and by Ronald's logic, unfavorable for Mitch and Rayna. We cannot find, under the circumstances, that Rayna's decision to loan Trust property to RMJ Properties was a basis for her removal as trustee.

¶35 CONCLUSION

¶36 We affirm the judgment of the circuit court.

¶37 Affirmed.